IN THE HIGH COURT OF JUDICATURE AT BILASPUR

CHHATTISGARH

CIVIL REVISION NO. 35 /2006 **Single Bench**

APPLICANT : Manoj Kumar Mangwani, Aged 35 years, S/o. Tirath Das Mangwani, R/o. Ward No. 3, Shahid Hemu Colony, Bemetara, Tahsil Bemetara, District Durg (CG)

RESPONDENT - 1

VERSUS

RESPONDENTS : 1. Jamuna Das Sukhwani, S/o. Mangal Das Sukhwani, Aged about 50 years, R/o. Ward No. 3, Sindhi Colony, Bemetara, Police Station and Tahsil Bemetara, District Durg (CG)----------Petitioner

2] Avinash Aglawe S/o. Arvind Aglawe, Aged about 35 years, R/o. Neha Sports Bemetara, P.S. and Tahsil Bemetara, District Durg (CG)

3] Kanhaiya Motwani S/o. Daulat Ram Motwani, Aged about 33 years, R/o. Sindhi Colony, Bemetara, P.S. and Tahsil Bemetara, District Durg (CG)

4] Prabhanshu Sharma S/o. C.P. Sharma, Aged about 37 years, R/o. Ward No.2, Sardar Vallabh Bhai Patel Ward, Bemetara, P.S. and Tahsil Bemetara, District Durg (CG)

5] Prashun Shukla, S/o. Manharan Shukla, Aged about 40 years, R/o. Ward No. 4, Kachhahari Para, Bemetara, District Durg (CG)

P.R. No. 654/06 Presented by Shri ... dated 29/3/06

(2)

6] Bachchumal Virani S/o. Arjun Das Virani, Aged about 30 years, R/o. Sindhi Colony, Bemetara, P.S. and Tahsil Bemetara, District Durg (CG)

7] Malaya Sharma, S/o Basant Sharma, Aged about 35 years, R/o. Ward No. 6, State Bank Colony, Bemetara, P.S. and Tahsil Bemetara, District Durg (CG)

8] Returning Officer and Sub-Divisional Officer (Revenue), Nagar Palika, Nirvachan 2004 (Presiding Officer- M.L. Gupta) Bemetara, District Durg (CG)

CIVIL REVISION UNDER SECTION 26(2) OF MUNICIPALITIES ACT, 1961

Being aggrieved by the order dated

AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

Civil Revision No. 35 of 2006

Manoj Kumar Mangwani

-Vs-

Jamuna Das Sukhwani & others

ORDER

Post for 05.09.2006

Sd/-
Sunil Kumar Sinha
Judge

seen
Dy. Shaikh

LISTED
(M.V. PARANJPE)
Adv

AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

Civil Revision No. 35 of 2006

Manoj Kumar Mangwani

-Vs-

Jamuna Das Sukhwani & others

Appearance:

Shri Manoj Paranjpe and Shri Vaibhav Govardhan, counsel for the applicant.

Dr. Shailesh Ahuja, counsel for respondent No.1.

None for other respondents though served.

ORDER
(05-09-2006)

SUNIL KUMAR SINHA, J.

(1) The applicant calls in question the legality of the order dated 28.2.2006 passed by the Additional District Judge, Bemetara (CG) in an Election Petition, registered as M.J.C. No. 3/2005, filed under Section 20 of the C.G. Municipalities Act, 1961 (hereinafter referred to as the Act 1961).

(2) The brief facts are that the applicant and respondent Nos.1 to 7 were the candidates, who contested the election of Councilor from Ward No. 3 of Municipal Council, Bemetara, District- Durg (C.G.) which took place on 14.12.2004. The counting was done on 19.12.2004. The results were declared on 26.12.2004 and in the said election, the applicant was declared to be the winning candidate having secured highest number of 172 votes. Respondent No.1 secured 170 votes and respondent Nos. 2, 3, 4, 5, 6 & 7 secured 80, 2, 12, 0, 1 & 61 votes respectively. The

election petition was filed mainly on the ground that the applicant, begot a child after 26th January, 2001 which increases the number of his children to more than two, and in this manner, he was disqualified to fight election as an effect of provisions of Section 38 (1) (ee) of the said Act, 1961. It was contended that he furnished a false affidavit in this regard before the concerned authority and due to this statutory disqualification, his election should be declared invalid. Respondent No.1 also claimed that since he had secured the next highest number of votes, he should be declared as elected in place of the applicant. It was specifically pleaded vide Para-7 (c) of the petition that the 4th issue of the applicant namely Chirag born on 31.1.2001 which disqualifies him for fighting the election under the aforesaid provisions.

(3) The applicant filed his reply denying the contentions of respondent No.1. It was very specifically pleaded by him that the birth of his child namely Chirag had taken place on 3.1.2001 i.e. prior to 26.1.2001, therefore, the question of he being disqualified for the said election does not arise. The other respondents, namely respondent Nos. 2 to 7 herein, remained ex-parte.

(4) The court below allowed the election petition and set aside the election of the applicant holding that under section 28(1)(ee) of the said Act 1961, the applicant was disqualified to contest the election of Municipal Councilor on the ground that the birth of his 4th child namely Chirag took place on 31.1.2001 i.e., after 26.1.2001.

(5) Learned counsel for the Applicant argued that the finding in relation to date of birth of the 4th child of the applicant is

perverse on the face of evidence on record and the court below erred in law in holding that the birth of the said child took place on 31.1.2001, whereas the said child was born on 03.1.2001.

(6) Per contra, learned counsel for the respondent no.1 argued that the finding in this regard are neither perverse nor contrary to the evidence on record and the same being a finding of fact, cannot be interfered in revisional jurisdiction under Section 26 (2) of the Act which is almost similar to that provided u/s 115 of the Code of Civil Procedure. Referring to the provisions of section 26(2), he further argued that the grounds available to the applicant in a revision filed against the decision on an election petition are limited to those particularly defined under the aforesaid section and the revision on the question of fact would not be maintainable.

(7) I have heard learned counsel for the parties at length and have also gone through the records of the election petition.

(8) About the scope of revisional jurisdiction, learned counsel for the applicant relied on the judgment rendered in the matter of ***Masjid Kacha Tank, Nahan –Vs.- Tuffail Mohammed, AIR 1991 SC 455***. It has been held by that Apex Court in the said judgment that it is well settled position in law that under S. 115 of the Code of Civil Procedure the High Court cannot reappreciate the evidence and cannot set aside the concurrent findings of the Courts below by taking a different view of the evidence. The High Court is empowered only to interfere with the findings of fact if the findings are perverse or there has been a non-appreciation or non-consideration of the material evidence on record by the

Courts below. Simply because another view of the evidence may be taken is no ground by the High Court to interfere in its revisional jurisdiction. He also referred to the decision rendered in the matter of ***Kalpataru Vidya Samasthe (R) and another – Vs.- S.B. Gupta and another, (2005) 7 SCC 524*** in which the Apex Court again ruled out that the High Court in its revisional jurisdiction under Section 115 cannot interfere with the findings of fact recorded by the courts below and reappreciate the evidence and interfere with the findings unless it is found that the findings recorded by the lower court were perverse or that there had been non-application of mind.

(9) There is no doubt in the mind of this Court that the revisional jurisdiction vested with this Court, particularly u/s 26(2) of the said Act of 1961 is limited to the two grounds referred to in this sub-section. These two grounds are that the decision is contrary to law and that the Judge has exercised jurisdiction not vested in him by law or has failed to exercise jurisdiction vested in him by law.

(10) The phraseology "contrary to law" means violating or not conforming to the provisions of law. In the context of second appeal u/s 100 C.P.C., the circumstances that a finding of lower appellate Court is based mainly upon evidence which is explicitly referred to and avowedly reproduced in the judgment, but is not to be found anywhere in the record, vitiates the decision and renders it "contrary to law" within the meaning of section 100 CPC. ***(Please see the Advanced Law Lexicon by Shri P. Ramanatha Aiyar, 3rd Edition 2005, Pg. 1034)***.

(11) Therefore, it is clear that though the High Court cannot reappreciate the evidence and cannot set aside the finding of a fact recorded by the court below by taking a different view of the evidence, but it is always empowered to interfere with the findings when they are perverse or when there appears to be a non-application of mind which ultimately would render the judgment of the court below "contrary to the law" and would be revisable u/s 26(2)(a) of the said Act of 1961.

(12) Now it has to be seen as to whether the finding in relation to date of birth of the 4th issue of the applicant, as recorded by the court below, is perverse or there had been a non-application of mind ? To prove the factum of date of birth, non applicant no.1 examined himself as P.W.2 and he also examined two other witnesses namely Dr.Naresh Tiwari (P.W.1) and Pt. Ramesh Chand Sharma (P.W.3). The non-applicant deposed about the date of birth of the 4th child of the applicant to be 31.1.2001. He also produced the gist of register of administration of Polio Drops to the children in which, in the age column, the date of birth of the child namely Chirag, s/o Manoj Mangwani has been mentioned as 31.1.2001 (Ex.D.1(c). The documents pertaining to obtaining the certified copy of the said record were also produced. P.W.1 is the Doctor who had supplied the copy of the gist of the register. P.W.3 is the priest who says that he has prepared *Janma Kundali* of the son of Manoj Mangwani. He further states that when any person visits to his place for preparation of *Janma Kundali*, he notes the date and time of the birth of child or the person of whom the *Kundali* is to be prepared in *Panchang* and on

the basis of the given date and time to him, he used to prepare the *Kundali*. He has also produced the copy of relevant page no.33 of the *Panchang* in which he had made the entry and the date which comes as *Magh Sudhi* 6 Wednesday, night 9.25 and the date recorded as per English Calendar is 31.1.2001. This was the evidence adduced by respondent no.1 which was considered by the lower Court vide paras 7 to 10.

(13) The applicant examined himself as D.W.2. He stated that the birth of his child took place on 03.1.2001. He had filed the copy of relevant pages of *Badi* (the details about the birth of the persons in his family, recorded according to the Hindu *ritis* alongwith *Thithi* etc. showing *Janmank* of the child born). The copy is proved on record as Ex.D.1(c). Along-with this, he also produced the birth certificate issued on 16.2.2005 by the Registrar of Births and deaths. A copy of this document is filed as Ex.D.2(c). Apart from this, a nurse namely Ku. Rekha Kavilash was also examined as D.W.1 who stated that she conducted the delivery of child of the applicant which took place on 3rd of Jan. 2001. The court below disbelieved the *Badi* and the oral evidence of the witnesses of the applicant on the ground that there were manipulations in the said *Badi*. It comes in para 11 of the judgment that at B to B place in the *Badi*, whitener (Eraser fluid) was used. It appears that what was written originally has been erased. The said *Badi* and the supporting oral evidence of the applicant as well as his other witnesses like nurse etc., have been disbelieved because according to the applicant, the date of birth was 03.1.2001 and the *Badi* Ex.D.1 shows that on said date the

Hindi Month and day are falling as *Magh, Sukla Paksh, Din Budhwar.* But according to the Hindi Calendar and *Panchang,* on 3.1.2001, the corresponding Hindi Month and day fall as *Paush Sudhi '8' Din Budhwar.* There is also cutting in the writing where the date according to the English Calendar is mentioned. If the complete contents of the *Badi* are read as it is in reference to Hindi Month and *Sudhi* etc. except the date according to the English calendar which is mentioned as 03.1.2001, by replacing it as 31.1.2001, this *Badi* would be correct according to the date and time. The court below took this view that the date in the *Badi* mentioned as 03.1.2001 is not correct and the *Badi* which has been filed is in fact, the *Badi* of a child who born on 31.1.2001. In this context, the certificate issued by the Registrar, Births and Death was also not believed and ultimately it was held that the birth of the 4th child of the applicant took place on 31.1.2001 and the applicant was disqualified to contest the elections under the provisions of section 38(1)(ee) of the said Act 1961.

(14) About the birth certificate, learned counsel for the applicant argued that the entry of the date of birth in the register of births and deaths recorded by an official in the performance of his duties cannot be doubted. He referred to the decision of the Apex Court rendered in the matter of ***Santenu Mitra –vs- State of West Bengal, AIR 1999 S.C. 1587***. In this case, while dealing with a matter under Juvenile Justice Act 1986, the Apex Court said that once the entry was recorded by the official in performance of his duties, it cannot be doubted on the mere argument that it was not contemporaneous with the date of the

suggested date of birth of the appellant. In this case, an enquiry u/s 8 of the said Act was conducted and in the said enquiry, the entries of the birth and death register made between 14.8.1978 and 8.11.1978 about the birth of the juvenile on 19.11.1972 was disbelieved. The Apex court while saying about the impugned order of the said case observed that the entry should not be disbelieved because it cannot be forgotten that the occurrence took place much later, say about 10 years, of the date of entry and it could not have been expected on the date when the entry was made that the appellant would claim benefit thereof on the commission of the same. The Apex Court also observed that this entry was not alone but added thereto was the LIC Policy and the Matriculation certificate likewise mentioning the date of birth of the appellant being 19.11.1972. In the present case, the entry about the date of birth was made under sub-section (3) of section 13 of Registration of Births and Deaths Act 1969. The contents of the certificate would show that this entry of date of birth as 03.1.2001 was made on 16.5.2005, that means almost after 4 years and 5 months of the said date that too with the assistance of the concerned Magistrate as the birth impugned could not be registered within one year of its occurrence. It is important to mention this fact here that this election petition was filed on 25.1.2005 and the applicant has caused his appearance on 03.3.2005 and when he received knowledge about the grounds raised in the election petition, then only, this entry was made which was much after filing of the petition. In the present situation, the benefit of the said judgment rendered by the Apex Court in the prevailing facts and circumstances of that case, in

which the entry though was made at a belated stage but was long earlier to the date of occurrence, cannot be given to the applicant and the present case is distinguishable on this point.

(15) Learned counsel next relied on a decision reported in ***AIR 1958 S.C. 143 – Sidheswar Ganguly –vs- State of West Bengal***. In the said case, while dealing with a criminal matter regarding conviction u/s 376 of I.P.C., the Apex Court said that the only conclusive piece of evidence of girl's age may be the birth certificate. There is no doubt that the birth certificate may be the conclusive proof of age, but the dispute raised in this case is that whether the certificate which appears to be purposely made by making a disputed entry regarding date of birth at a very belated stage at the instance of the Magistrate under special provisions for delayed registration for defending a case should have been relied on or not ? If the certificate, in the facts and circumstances of this case, appears to be begotten and which is also contradictory to the *Badi* and *Janmank* filed by the applicant himself, was not relied by the court on the face of those two documents, then the view taken by the Court disbelieving the certificate appears to be correct and the benefit of observations made by the Apex Court in the said matter, which was made for a cases where the entry is made in the normal course, cannot be given to the applicant.

(16) It is an accepted principle that an entry in the Register of Births is not conclusive evidence of the disputed date of birth. So also is an entry made pursuant to the direction of the Magistrate, under section 13(3) of Registration of Births and deaths Act,

1969. The policy of law embodied in section 13 is to avoid manipulation in the entries relating to the date of births and deaths. This section is just a constraint on the Registrar. It is not a provision whereby an aggrieved party could get an adjudication on his disputed date of birth. The order of the Magistrate binds only the Registrar and not others. ***(Please see AIR 1976 Karnataka, 231 (H. Subba Rao –Vs.- The Life Insurance Corporation of India and another)).***

(17) In the case on hand when the dispute arose regarding date of birth, the applicant took the assistance of the Magistrate u/s 13(3) of the Registration of Births and Deaths Act, 1969 and pursuant to the directions of the Magistrate, the entry was made which clearly appears to be done for the purpose of creating an evidence during the pendency of the dispute and the court below has rightly disbelieved the entry.

(18) Learned counsel for the applicant also referred to the judgments of the Apex Court in ***AIR 1981 SC 361 (Harpal Singh and another –Vs.- State of Himachal Pradesh)*** and ***AIR 1982 SC 1057 (Umesh Chandra –Vs.- State of Rajasthan)***, in regard to admissibility of the entries in the Public documents u/s 35 of the Evidence Act. There is no dispute about the legal prepositions laid down in above judgments. In case on hand the dispute relates to correctness of the entry in the certificate and genuineness of the same to said effect, which the Court below has dealt with as above and has disbelieved the entry.

(19) Lastly, learned counsel for respondent No.1 claimed that when the applicant was declared disqualified and this respondent

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had secured second highest number of votes, he should have been declared elected by the Court below and such a declaration should be given in this petition. The records of the case would show that for such a relief, M.(C.)P. No.742/2006 has also been filed by respondent No.1 during the pendency of this petition.

(20) In the opinion of this Court, such a declaration cannot be made in this case in view of the two decisions of the Apex Court rendered in the matters of ***Vishwanath Reddy -Vs- Konappa Rudrappa Nadgouda, AIR 1969 SC 604*** and ***Gadakh Yashwantrao Kankarrao –Vs.- E.V. alias Balasaheb Vikhe Patil and others, (1994) 1 SCC 682***. The Apex Court observed in the matter of ***Vishwanath Vs. Konappa (Supra)*** as follows:-

> "We are again unable to see any logic in the assumption that votes cast in favour of a person who is regarded by the Returing Officer as validly nominated, but who is in truth disqualified, could still be treated as valid votes, for the purpose of determining whether a fresh election should be held. When there are only two contesting candidates, and one of them is under a statutory disqualification, votes cast in favour of the disqualified candidate may be regarded as thrown away, irrespective of whether the voters who voted for him were aware of the disqualification. This is not to say that where there are more than two candidates in the field for a single seat, and one alone is disqualified, on proof of disqualification all the votes cast in his favour will be discarded and the candidate securing the next highest number of votes will be declared elected. In such a case, question of notice to the voters may assume

> significance, for the voters may not, if aware of the disqualification have voted for disqualified candidate."

(21) The aforesaid observations were again quoted by the Apex Court, with emphasis supplied, in the matter of ***Gadakh Yashwantrao Kankarrao (Supra)***. The Apex Court clearly laid down that where there are only two contesting candidates and one of them is disqualified, in such situation, the votes cast in favour of the disqualified candidate may be regarded as thrown away, irrespective of whether the voters who voted for him were aware of the disqualification. The Supreme Court observed that where there are more than two candidates in the field for a single seat and one alone is disqualified, then question of notice to the voters may assume significance, for the voters may not, if aware of the disqualification have voted for the disqualified candidate. The Supreme Court clearly observed that where there are more than two candidates and one of them was disqualified, then in such a case the election can be set aside, but a declaration cannot be granted in favour of the person who received next highest votes.

(22) In this case, admittedly, there were more than two contesting candidates and the remaining candidates have also polled reasonable number of votes as referred to in Para-2 of this order, and in the said situation, the Court below has rightly not declared respondent No.1 as a winning candidate. There is no force in the point raised by learned counsel for respondent No.1 and same is turned down.

(23) For the foregoing reasons, this revision as well as M.(C.)P. No. 742/2006 both stand dismissed. There shall be no order as to costs.

Sd/-
Sunil Kumar Sinha
Judge

Rao/v